

# Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review

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The Covid-19 pandemic hit Israel in fragile political and constitutional times. After three consecutive national elections and during unprecedented and [continuous constitutional crisis](#), it has deepened an interbranch conflict that has led to the High Court of Justice (HCJ) taking part, in real time, in a dynamic judicial review. The HCJ not only facilitated the functioning of the parliament but also expedited its oversight on the government's [use of emergency powers](#).

## Constitutional crisis, political reshuffle

Israel has entered the coronavirus era in an unprecedented political reality. The current caretaker government has been presiding for more than a year – the longest period in the nation's history. The country is being governed by the principle of *continuity* and not by the democratic principle and people's trust. The full formation and functioning of the Knesset is normally predicated on distribution of seats between coalition and opposition in committees according to election outcomes. But with the inability to win an election by the two major parties and the uncertainty as for who will be the coalition and who the opposition, the process of filling out positions in the Knesset gets stuck.

The last election, which took place on 2 March 2020, enabled a narrow parliamentary majority for a party bloc led by *Blue and White*, which was under the leadership of Benjamin Gantz. As a result, Gantz was granted by the President the mandate to assemble a coalition, creating the possibility that the coalition will not be controlled by *Likud*. On March 16, the 23<sup>rd</sup> Knesset was sworn but before the Knesset committees were formed, the caretaker government began to exercise emergency powers to address the coronavirus crisis. The two major parties began negotiating a broad government, yet alongside the negotiations, the *Blue and White* party sought to take advantage of its slim parliamentary majority to elect a permanent speaker for the Knesset on its behalf and to establish Knesset committees on the basis of the balance of power between the two political blocs.

The 23<sup>rd</sup> Speaker of the Knesset, Yuli Edelstein from *Likud*, was still in office due to the constitutional rule of continuity until the Knesset would elect a permanent one. Nonetheless, he signalled that he was not willing to put requests by 61 (out of 120) Members of the Knesset (MKs) to advance the establishment of the committees as well as to introduce a vote on his replacement on the Knesset's agenda. This refusal of the Speaker was [mixed-motivated](#) at best. In response, [on March 18, 2020 over](#)

[fifty public law scholars from various law schools in Israel have sent a letter to the Speaker of the Knesset, MK Yuli Edelstein and Legal Advisor of the Knesset, Adv. Eyal Yinon, calling for the immediate assembling of the Knesset.](#)

## Triggering Constitutional Emergency without the Knesset

During the political and parliamentary reshuffle, the government began unilaterally exercising emergency powers in mid-March to deal with the coronavirus crisis.

Prime Minister Netanyahu's response to the crisis included a host of [harsh measures](#) including restrictions on movement and social distancing measures and tracking and surveillance. The government has also triggered a special emergency regime in the court system, as interim Minister of Justice Amir Ohana, a close Netanyahu ally, expanded his powers to freeze court activity in case of escalation in coronavirus cases in Israel. The drastic actions have raised the fear that the crisis is being used to delay the opening of Netanyahu's own criminal trial, which was originally scheduled for March 17 but has been postponed by the district court for May 24.

National Security threats in Israel, [limited parliamentary oversight](#), and the centralized control structure of the government and cabinet, enabled [accommodation](#) to emergency.

Starting February 2, the government operated mainly by virtue of special powers under the Public Health Ordinance-1940, which includes an emergency regime relevant to dealing with epidemics, and, since March 16, by virtue of the constitutional emergency regime provided for in section 38 of the [Basic Law: the Government](#). Instead of declaring an emergency, the government acted on the basis of a [permanent and renewed](#) declaration that there is a national security emergency in Israel. Beyond the [interpretative constitutional problems that this action raised](#), its actual result led to a rapid use of emergency regulations, at the twilight between the end of the 22<sup>nd</sup> Knesset and before the establishment of the 23<sup>rd</sup> Knesset's committees.

The [rapid authorization](#) procedure of emergency regulations, bypassing the usual parliamentary committees channel, is illustrative of the speed with which the government sought to exert extreme powers and its problematic attitude to separation of powers. The absence of parliamentary oversight of the process of promulgating the emergency regulations raised serious legal issues discussed in a petition to the HCJ. It challenged the government's decision to promulgate a set of emergency regulations authorizing the Israel Security Agency to aid in the national effort to limit the spread of the new coronavirus, and permitting the collection, processing and use of "technological data" of persons who have contracted the virus. In the hearing, the [HCJ asked the government for explanations as to why the Knesset committees are inactive and issued an interim order limiting the use of regulations until parliamentary oversight was established](#). Due to this first petition

and the follow-up questions requested by the HCJ, its activity began to stimulate the political system for the establishment of the Knesset committees, at this point in time.

This full background, and the reverse relationship between a non-functional Knesset and Hyper-functional executive, is relevant to properly understand the HCJ's involvement [securing Knesset formation](#), in its ruling on the petition to replace the temporary Knesset Speaker.

## Dynamic judicial review

On March 18<sup>th</sup>, the *Blue and White* party, the Labor-Meretz party and the Israel Beiteinu party, on behalf of a majority of 61 MKs (out of 120) and coupled with public interest petitioners, submitted a petition to the HCJ asking for the Knesset Speaker to include the election of a permanent Speaker for the 23<sup>rd</sup> Knesset on the Knesset Floor and to allow for the formation of Knesset committees. The petitioners argued that the Speaker has a personal conflict of interests, is acting unreasonably, and that his decision is tainted by extraneous considerations. The Speaker's argument focused on Art. 2(b) of the Knesset Rules of Procedure, according to which permanent Speaker can be elected at any stage between the convening of the Knesset and the establishing of the Government, arguing that this rule leaves broad discretion to the Speaker in deciding when to vote on that issue.

[Internal parliamentary proceedings are justiciable in Israeli constitutional law](#). The constitutional standard of review in such matters [sets a balance between securing "the rule of law in the legislature" and the need to respect the special standing of the Knesset in decisions concerning its internal affairs](#). Deference to Knesset inter-parliamentary matters is respected as long as the alleged violation of the intra-parliamentary process does no harm the "fabric of parliamentary life" and does not "severely influence fundamental structure of the constitutional order".

[In its decision of March 23, an extended bench of 5 judges unanimously held that the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process](#).

Chief-justice Ester Hayut acknowledged that the Speaker has discretion according to the Knesset Rules of Procedure but stressed that it is "limited and defined", due to the fact that the Speaker was serving by virtue of the continuity rule, and thus maintains a severe conflict of interest. In this unique situation of a second caretaker government after a "failure of the public's representatives to constitute a permanent Government in Israel even after three rounds of elections", the decision to refuse to summon the plenary for electing a permanent Speaker is incompatible with the scope of his authority as acting Speaker, holding his office "as a temporary trust", and deviates from the margin of discretion granted to him.

Apart from that, the court's decision was based on two constitutional principles: respect of the parliamentary majority in parliamentary proceedings and the need for constitutional separation between the Knesset and the government. As far as the first principle is concerned, and even though the parliamentary majority the HCJ

faced was not a solid coalition majority in its usual sense, the court emphasized that the Speaker could not exercise powers in a way that opposed the position of the majority. The defect in the speaker's conduct, the court noted, primarily inheres in the fear that it frustrates the will of the electorate.

Alongside accepting the parliamentary majority request, the court emphasized the separation of powers. Responding to the Speaker's argument that the election of a permanent Speaker is contingent upon the efforts to form a government, Chief-justice Hayut held that this approach "puts the cart before the horse". The Knesset is the sovereign and not – citing (former) Deputy Chief-justice Rubinstein – "the Government's cheerleading squad".

Chief-justice Hayut concluded her judgment by stating that

"the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process. It clearly harms the status of the Knesset as an independent branch of government and the process of governmental transition, and this all the more so as the days pass since the swearing in of the 23<sup>rd</sup> Knesset. Therefore, in these circumstances, there is no recourse but to conclude that we are concerned with one of those exceptional cases in which the intervention of this Court is required in order to prevent harm to our parliamentary system of government."

The court thus ordered the Speaker to convene the Knesset plenum as soon as possible for the purpose of electing a permanent Speaker for the 23rd Knesset, and no later than March 25, 2020.

[Some have criticized this judicial involvement in inter-parliamentary proceedings as violating Knesset's independence](#) but we, in contrast, regard this decision as justified. [It reflects the increasing role of the HCJ as guardian of the Knesset and protector of Israel's institutional constitution, preserving and strengthening the actions and processes of the political and democratic institutions.](#) It demonstrates the HCJ's [dynamic role in upholding the rule of law in Israel](#).

## **(Current) Aftermath**

Following the judgment, on March 25, the Speaker announced to resign from his position and adjourned the session, thereby not allowing his replacement. In this speech, the Speaker said that his conscience does not allow him to follow the court's ruling that has violated the legislature's independence.

According to the Knesset Rules of Procedure, the resignation was to enter into force after 48 hours, and in his resignation, the Speaker sought to delay the vote for his replacement. Of course, the resignation did not affect the Speaker's obligation to follow and execute the judicial order. In other words, by his actions, the Speaker violated the absolute order given in the judgment.

Accordingly, the HCJ was asked to declare the Speaker in contempt of court, and also (HCJ 2252/20) to declare the immediate ending of the Speaker's tenure, and that the longest-serving Member of the Knesset be appointed as Speaker until the election of a permanent Speaker. After an urgent hearing (March 25<sup>th</sup>), the HCJ heavily criticized the disobeying of its judicial order:

“[U]ntil today, never in the history of the State has any governmental office openly and defiantly refused to carry out a judicial order while declaring that his conscience does not allow him to comply with the judgment. That is what [the Speaker] ... chose to do, and the harm of his conduct to the public interest in preserving the rule of law and compliance with judgments and judicial orders is immeasurably severe”.

[The court accepted the path to solve the constitutional crisis presented by the Legal Advisor of the Knesset, and ordered that “the longest serving Member of Knesset be granted limited, defined authority” to convene and preside over a plenum session on March 26 in which the motion for the election of a permanent Speaker would be set on the agenda.](#)

The next day, another political bomb landed, as Benny Gantz nominated himself for the position of Speaker and was indeed elected as the Speaker with the support of *Likud*, a move that has caused the split of *Blue and White* party. This move was interpreted as part of a power-sharing deal to form a national emergency government. Negotiations of forming such a government are still ongoing but one may wonder what role the HCJ has played in accelerating these political developments.

Either way, the HCJ's judicial involvement – both against the Speaker but also in the petition concerning the emergency regulations – should be understood as a democratic buffer. Its dynamic judicial review significantly contributed to the Knesset's formation, at a critical point in which an emergency was activated without the latter functioning properly.

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